Supreme Court, U.S.
FILED
MAR 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1068

In The

Supreme Court of the United States

October Term 1986

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LAWRENCE DUNCAN and MARGARET DUNCAN,

Petitioners,

-v-

STATE OF GEORGIA

Respondent.

—o—

On Petition For Writ of Certiorari to the Court of Appeals of the State of Georgia

—o—

PETITIONERS' REPLY TO BRIEF OF RESPONDENTS

—o—

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REPLY OF PETITIONERS TO BRIEF OF RESPONDENT

Pursuant to rule of the Supreme Court of the United States 22.5, the within is a reply brief on behalf of Petitioners' Duncan. Same is in reply to the first question for review as posed in Respondent's Brief in Opposition to

the Petition for Writ of Certiorari. In accordance with Court Rule 22.5 the within brief is limited to issues first raised in Respondent's Brief in Opposition.

In that Brief, Respondent acknowledges that Petitioners addressed the issue of standing to contest the illegal seizure of the telephone toll records under the Fourth and Fourteenth Amendments of the United States Constitution and under Georgia law. Respondent argues, however, that "Petitioners failed to timely raise an assertion that they had standing under 18 U.S.C. § 2518 to challenge the alleged illegality of the subpoenas."

In this regard, Respondent states that, "[i]n the original briefs filed in the Court of Appeals of Georgia, the Petitioners raised this [illegal subpoena] allegation under the Fourth Amendment to the United States Constitution and asserted this allegation under the Georgia wiretap statute. See, O.C.G.A. § 16-11-67. Petitioner did not mention the federal wiretap statute in relation to this allegation . . . . Petitioners did not raise this statutory concept until after the Court of Appeals of Georgia had rendered its original opinion." Respondent's Brief, p. 3.

In sum, Respondent concedes that the issue of standing was raised before the Court of Appeals, but complains that 18 U.S.C. § 2518 was not cited in support of that issue until rehearing in that court.

Pretermitting whether failure to argue an authority in support of an issue in the court below would preclude a party from citing that authority in support of that same

issue on appeal,[1] Petitioners did in fact cite 18 U.S.C. § 2518 in their original brief before the Court of Appeals in support of their Enumeration of Error Number One. Enumeration of Error Number One dealt exclusively with the illegal subpoena and standing issues, and the ensuing illegality of the electronic surveillance. (Supplemental Appendix "M").

In Part III, Section (i) of Petitioners' original Brief in the Court of Appeals of Georgia, (Supplemental Appendix "N"), it was recited as follows: "(i) . . . [Enumerations of Error 1-20]. Both federal and state law provide statutes regulating and controlling the use of electronic surveillance. The federal statute is Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. . . . In Georgia, it has been held that the provisions of both the federal and state statutes must be met in order for electronic surveillance to be legal and in order for it to be admissible at trial. (cits.). 'Whether the

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[1]Decisions of this court indicate that if the question raised is "only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment . . . .," then this Court would "have no hesitation in holding the assignment sufficient to permit the question to now be raised and argued. Parties are not confined here to the same arguments which were advanced in the Courts below upon a Federal question there discussed." *Dewey v. Des Moines*, 173 U.S. 193, 197-198, 43 L. Ed. 665, 19 S. Ct. 379 (1899). See also in this regard, *Terminiello v. Chicago*, 337 U.S. 1, 93 L. Ed. 1131, 69 S. Ct. 894 (1949); *Vachon v. New Hampshire*, 414 U.S. 478, 38 L. Ed. 2d 666, 94 S. Ct. 664 (1974); *Stanley v. Illinois*, 405 U.S. 645, 658, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972); *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982); *Wood v. Georgia*, 450 U.S. 261, 67 L. Ed. 2d 220, 100 S. Ct. 1097 (1981).

proceedings be federal or state, interpretation of a state wiretap statute can never be controlling where it might impose requirements less stringent than the controlling standard of Title III,' " citing. *Cox v. State*, 152 Ga. App. 453 (1979).

Thus, Respondent is incorrect in the assertion that 18 U.S.C. § 2518 was not cited in support of Enumeration of Error Number One in the Court of Appeals of Georgia, which dealt exclusively with the illegal subpoena and standing issues, and the ensuing illegality of the electronic surveillance.

Although further argument as to Enumeration of Error Number One followed in Section (ii) of the Brief without additional citation to 18 U.S.C. § 2518, this does not take away from the fact that 18 U.S.C. § 2518 had previously been cited as a basis of error in Section (i) of the Brief as to that same enumeration of error. As such, this federal authority was cited to the Court of Appeals of Georgia as a pertinent basis for ruling that the electronic surveillance was illegal. " 'No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time.' " *Street v. New York*, 394 U.S. 576, 584, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969).

CONCLUSION

Respondent argues that Petitioners failed to present an assertion regarding standing to the Court of Appeals of Georgia until rehearing in that court. Upon close scrutiny, however, the Respondent concedes that the issue of standing was squarely before the court but argues that Petitioners failed to cite 18 U.S.C. § 2518 in support of the standing issue. Again, as shown above, 18 U.S.C. § 2518 was cited in support of Enumeration of Error Number One in the original brief to the Court of Appeals, Enumeration of Error Number One dealing solely with the illegal subpoena and standing issues. This citation and argument in the brief before the Court of Appeals of Georgia was apparently overlooked by Respondent in preparing its response to the Petition for Writ of Certiorari. As such Respondent's first question presented, (page i of Respondent's Brief), is without merit.

Respectfully submitted,

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APPENDIX "M"

IN THE COURT OF APPEALS OF GEORGIA

LAWRENCE DUNCAN and
MARGARET DUNCAN, et al.,

Appellants,

vs. APPEAL NO. 72190

STATE OF GEORGIA,

Appellee.

ENUMERATION OF ERRORS

(1) The trial court erred in denying Appellants' motion to suppress all evidence seized as a result of the wiretap in that the same was obtained through use of illegal, sham subpoenas issued in nonexistent cases.

APPENDIX "N"

PART III

ARGUMENT AND CITATION OF AUTHORITIES

(i) *General Provisions of Law* (Enumerations of Error, 1-20).

Both federal and state law provide statutes regulating and controlling the use of electronic surveillance. The federal statute is Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510-2520. The applicable Georgia code sections are O.C.G.A. §§ 16-11-60, 16-11-62, 16-11-64, 16-11-67, and 16-11-69. In Georgia it has been held that the provisions of both the federal and state statutes must be met in order for electronic surveillance to be legal and in order for it to be admissible at trial. See, e.g., *Orkin v. State*, 236 Ga. 176, 179 (1976); *Cox v. State*, 152 Ga. App. 453 (1979). " '[W]hether the proceedings be federal or state, interpretation of a state wiretap statute can never be controlling where it might impose requirements less stringent than the controlling standard of Title III. If a state should set forth procedures *more* exacting than those of the federal statute, however, the validity of the interceptions and the orders of the authorization by which they were made would have to comply with that test as well.' " [Emphasis by the court]. *Cox* at p. 455, quoting *U.S. v. Marion*, 535 F.2d 697, 702 (2d Cir. 1976).